ARAB-MALAYSIAN FINANCE BHD.

v.

RAZSHAH ENTERPRISE SDN. BHD.

HIGH COURT, IPOH
DATO' PEH SWEE CHIN SCJ
[ORIGINATING SUMMONS NO. 31-653-88]
14 APRIL 1992

LAND LAW: Charge on land as security for money lent - Non-payment of loan - Order for sale by public auction - Allegation of new agreement - Whether amounts to cause to the contrary - Section 256(3) National Land Code 1965.

The plaintiffs by way of an originating summons an order applied for sale by public auction of land charged to the plaintiffs in return for a loan of RM2.4 million lent to one Wan Mokhtar bin Wan Endut, a director of the defendant company. Section 256(3) of the National Land Code provides that a court shall order the sale of land or lease to which a charge relates unless it is satisfied of cause to the contrary. The chargor raised three points showing cause to the contrary:

(i) That the chargee must be free of fault before obtaining an order for sale to the land. In this respect, the appellant submitted that there was a new agreement to allow for the titles to be redeemed at RM65,000 per title but despite the payment of RM2.515 million, not a single title had been released.

(ii) It was contended that the chargee had failed to state the sum paid to account of principal and interest and why the amount paid had not settled the loan.

(iii) It was contended that the chargee did not demand for the money claimed.

Held:

[1] The purported "new" agreement vide the chargees letter dated 10 July 1987 was an agreement for extension of time to repay the loan. Repayment was to be made by a lumpsum payment by 31 December 1987 OR by the redemption of "shophouse titles" whichever was earlier.

[2] At the same time, the RM2.515 million paid by the chargor was not paid to account of the principal sum of RM2.4 million as on the date of the charge instruments. If it had been so, the provision for "monthly rests" would have come to nought and the chargee would have been denied the right to apply the RM2.515 million to the lawful debts due and owing, *vide* ss. 60 and 61 of the Contracts Act 1950.

[3] The absence of demand was a question of fact. Since it was not deposed on affidavits, it cannot be raised in submission.

[4] Wan Mokhtar was acting as agent of the chargor.

[Order for sale granted.]

Note: The defendants have appealed to the Supreme Court against the said decision.

Legislation referred to:
Contracts Act 1950, ss. 60 & 61
National Land Code 1965, s. 256 (3)

For the plaintiff - Leong Mei Choom; M/s. Choong Yik Son & Fiona Ghaus, Kuala Lumpur
For the defendant - Izzat Othman; M/s. Chua Bros., Azzat & Izzat, Kuala Lumpur

JUDGMENT

Peh Swee Chin SCJ:

The appellant was the chargor of rather valuable land comprising 65 titles of shoplots and the respondent, the chargee, in respect of RM2.4 million lent to one Wan Mokhtar bin Wan Endut, a director of the chargor/company, pursuant to terms and conditions as contained in the familiar annexure to the charge instruments.

The annexure, *inter alia*, provided for monthly payments of interest on balance outstanding to be made on 1st day of every month and the whole loan was to be paid within 2 years from the date of its payment to the said Wan Mokhtar.

For alleged non-payment in full of the loan and interest, the chargee commenced proceedings by way of originating summons herein for order of sale by public auction etc. under s. 256 of the National Land Code which by subsection (3) thereof, provides:

> (3) On any such application the court shall order the sale of land or lease to which a charge relates unless it is satisfied of cause to the contrary.

The order of sale was granted on 9 January 1989 in the absence of the chargor who had

been allegedly served. The chargor then applied by summons filed on 15 April 1989 to set aside the order of sale and for leave to enter appearance and defend.

Service of the originating summons is believed to have been found irregular and the order of sale was set aside on 9 March 1990. On the same day, leave to enter appearance was granted. The originating summons was adjourned for arguments on merits on a later date when the court held that the chargor had failed to show cause to the contrary and then made order of sale again by public auction, and from such decision the chargor has appealed to the Supreme Court.

Three points were taken by the chargor at the hearing before me.

The first point was that the chargee must be free of fault before obtaining an order of sale to the land. It was submitted to the effect that there was a new agreement subsequent to the annexure between the chargee and the chargor, to allow each of the titles to be redeemed on payment by chargor of RM65,000 per title and despite the payment of RM2.515 million in pursuance thereof, not a single title had been released.

The second point was that the chargee had failed to state how much was paid to account of principal and interest respectively and why the payment by Encik Wan Mokhtar to the tune of RM2.515 million had not settled the loan.

The third point was there was no demand for the money claimed from the chargee to the chargor.

On the first point, the retort was that the new agreement referred to was not an agreement to release each of the titles after receipt of payment for RM65,000 per title by way of redemption but an agreement to extend time to the chargor for repayment of loan subject to conditions as contained in a letter dated 10 July 1987 from the chargee and addressed to Encik Wan Mokhtar (a director of the chargor company). The conditions were not complied with by the chargor, especially for non-payment of the total balance due by 31 December 1987 and for failure by the chargor to make monthly payments of interest. The new agreement ceased to apply on 31 December 1987, it was submitted. No unreasonable conduct on the part of the chargee was found.

On the second point, it was submitted to the effect that the sum of RM2.5 million repaid by the chargor was not enough to settle all that was due and the chargee could not supply the figures as to how much was paid to principal and interest respectively as interest charges was capitalized monthly and converted into additional loan principal if not paid.

On the third point, it was submitted that the point was never raised (in affidavits), if it was, the chargee would have been able to show such demand.

The real bone of contention was really in regard to the letter dated 10 July 1987 relied by both parties and referred to earlier and which is set out below for ease of reference:

> ARAB-MALAYSIAN FINANCE BHD.
>
> Our ref 7/817/TL/83
>
> 10 July 1987
>
> Encik Wan Mokhtar bin Wan Endut
> 14A-15A Jalan New Pasir Puteh
> Ipoh
> PERAK
>
> Dear Sirs,
>
> RE: TERM LOAN OF RM2.4M
>
> We refer to our letter of offer dated 28 May 1983 and thereafter letter dated 7 October 1985.
>
> In response to your future request, we are pleased to inform you that our Board has agreed to extend the repayment due date of the principal balance outstanding on the above facility as follows:
>
> i. Monthly servicing of interest on principal balance outstanding.
> ii. One lump sum repayment of principal outstanding on 31 December 1987 or upon redemption of shophouse titles whichever is earlier.
>
> The redemption sum of shophouse titles shall be at RM65,000 per title.
>
> Further, the interest rate has been reduced from fifteen per cent (15.0%) per annum on monthly rest to four and a half percent (4.5%) above our Base Lending Rate currently pegged at nine and a quarter per cent (9.25%) or thirteen and three quarter per cent (13.75%) per annum on monthly rest hereinafter referred as the "Prescribed Rate" with effect from 1 May 1987.

Similarly, damages on late payments (additional interest) is reduced from 0.05% per day to 0.0493% per day with effect from 1 February 1987. Thereafter effective 1 July 1987 it shall be three per cent (3.0%) above the "Prescribed Rate".

The above revised terms are subject to your updating of all interest outstanding to-date.

Kindly signify your acceptance of the above by returning the duplicate copy of this letter duly signed within the next three (3) weeks from the date hereof.

Yours faithfully
for ARAB-MALAYSIAN FINANCE BHD.

Sgd.

MOHAMED AZMI MAHMOOD	ONG LEONG HUAT
Senior Manager Operations	Manager Ipoh Branch

Second para of the letter has set out the conditions and terms for repayment of the outstanding balance of the principal, and it would appear to reinforce the argument of the chargee that the "new" agreement was for extension of time to repay the loan. The expression of "outstanding balance of principal" must be understood to mean the amount owing including the original principal or loan of RM2.4 million mentioned in the annexure to the charge instrument AND the interest due and owing which was capitalized on "monthly rests" as permitted by the terms of the loan contained in the said annexure, so that capital or balance of capital would have been growing month by month, year by year if monthly payments of the interest were not kept up regularly.

It was the contention of the chargor (and it was even possible that Encik Wan Mokhtar himself had believed actually) that this letter gave the chargor by its para 3, the right to have released to the chargor one title on payment of each sum of RM65,000 to the chargor. This was the construction which the chargor sought to persuade the court to accept.

Could the words mean what was contended for by the chargor? The court looked at the words in ascertaining the contention of the parties, and the court could not but find such intention as expressed by the words in the letter.

It would seem that the repayment of the amount due and owing was to be by a lump-sum payment by 31 December 1987 OR by the redemption of 'shophouse titles' whichever was earlier. The words, "whichever is earlier", could only mean in the context that such redeeming of the titles must be before 31 December 1987 if such redeeming was to be carried out instead of making one lump-sum repayment on 31 December 1987.

Nobody told the court how much it would be if all the titles were redeemed at the rate of RM65,000 per title, or whether the total sum thus collected by the chargor, could be more advantageous to the chargee or less so, when compared with roughly the sum that should be due on the total amount of principal (including its part capitalized from accrued interest) by 31 December 1987. It would not have been necessary to ascertain all these for determining the issues in this case.

To accede to the argument of the chargor that the titles should have been released to the chargor proportionally to the amount paid by the chargor from time to time on the basis of RM65,000 per title would frustrate the very purpose of the "new" agreement, the purpose being the repayment of the outstanding balance by the date as fixed in the letter, that is, 31 December 1987. From the letter, the intention found by the court was that it was designed for settling the loan and interest by a fixed date of 31 December 1987. It would seem to me that the chargee was probably becoming impatient for the 2 year period for repayment provided in the annexure dated 6 July 1983 had long expired.

About the second point of RM2.515 million paid by chargor not being enough to settle what was due one must have regard to the interest chargeable and payable as shown in the annexure. I did not think that the argument of the chargor had amounted to an allegation that the RM2.515 million paid by it was paid expressly to account of the original principal of RM2.4 million as on the date of the charge instruments. If it did, there was no evidence, circumstantial or direct to indicate that the payments over a period of time amounting to RM2.515 million were expressly and conditionally made to the account of that original principal of RM2.4 million only. If it had been so, this would have rendered nugatory in effect the provision for "monthly rests" referred to above, apart from denying the right of the chargee to apply the RM2.5 million to any of the

lawful debts due and owing, *viz*. principal or interest, *vide* ss. 60 and 61 of the Contracts Act 1950.

On the third point - absence of demand, I thought it was a question of fact, whether there was such a prior demand. That being so it must be deposed to in the affidavit instead of having it mentioned by learned Counsel in submission. It was not so deposed to, there was consequently no opportunity to reply it by further evidence or affidavit by the opponent. The point, during submission was not pressed, otherwise I would have begun to consider whether to give time to both parties to depose further on affidavits, though with hindsight I might not have allowed them to do so for such evidence, for one thing, could have obtained with reasonable diligence.

Before concluding, I must refer to one point asserted by learned Counsel for the chargee that the new agreement in terms as alleged by Encik Mokhtar was between the chargee and Encik Mokhtar and not between the chargor and Encik Mokhtar so that presumably the chargor could not be burdened with the new agreement. I found the point to be of no substance as it was so apparent that the chargor/company was the alter ego of Encik Mokhtar who also had signed the charge instruments as director of the chargor/company. The titles to the shoplots have been at all material times registered in the name of the chargor. I found as a fact without difficulty that Encik Mokhtar was acting as an agent of the chargor/company like all directors of all other companies as agents of their companies.

In the result, I was satisfied no cause had been shown to the contrary and I made the order of sale by public auction.

DANING BIN LAJA

v.

K. K. HJ TUARAN BIN MAJID

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[CIVIL SUIT NO. T. 81 OF 1983]
21 SEPTEMBER 1992

TORT: Assault and battery - Whether malicious - Damages - Compensation for reparation for wrongful act - fair and reasonable compensation - Loss of earning capacity, whether claimable - Damages for pain and suffering.

The plaintiff sued the defendant for damages for assault and battery. The defendant fired a shot at the plaintiff which caused the plaintiff impotence, incontinence of urine, paresis of the left interior extremity and shortening of the limb.

Held:

[1] On the balance of probabilities the act of the defendant was intentional and not accidental. In a claim, for assault and battery it need not be proved that the act was a malicious one.

[2] There must be satisfactory evidence of future loss of earnings and the court must be satisfied that there is a loss of earning capacity. In this case the claim for loss of earnings failed as the plaintiff's trade depended on the skill of his hands and not on his legs and body.

[3] The award for pain and suffering depends on the gravity of the plaintiff's injuries and must be in line with the present trend taking into account all the circumstances of the case.

[Judgment for the plaintiff with costs to the taxed.]

Cases referred to:

Ong Ah Long v. Dr. S. Underwood [1983] 2 MLJ 333 (cit)

Mahamad bin Mahamad Said & Anor. v. Perianayagam & Anor. [1972] 1 MLJ 67 (cit)

Ngooi Ku Siong & Anor. v. Aidi Abdullah [1985] 1 MLJ 30 / [1984] 2 CLJ 163 (cit)

Seah Yit Chen (f) v. Singapore Bus Service [1978] Ltd & 2 Ors. [1990] 2 CLJ 901 (cit)

Raja Mohktar v. Public Trustee [1970] 2 MLJ 151 (refd)

Wong Yee Pen v. Sharifudin Bin Yusof [1989] 2 CLJ 1098 (refd)

Other source referred to:

Halsbury's Laws of England, 4th Edn., paras 1310 & 1311